

E-Filed 4/16/10

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

THANH VAN DO,

Petitioner,

v.

GARY SWARTHOUT, Warden,

Respondent.

No. C 10-0759 RS (PR)

**ORDER DISMISSING
PETITION WITH LEAVE
TO AMEND**

INTRODUCTION

This is a federal habeas petition filed pursuant to 28 U.S.C. § 2254 by a *pro se* state prisoner. Petitioner has paid the filing fee. His petition is now before the Court for review pursuant to 28 U.S.C. § 2243 and Rule 4 of the Rules Governing Section 2254 Cases.

DISCUSSION

This Court may entertain a petition for writ of habeas corpus “in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a). A district court considering an application for a writ of habeas corpus shall “award the writ or issue an order directing the respondent to show cause why the writ should not be granted,

No. C 10-0759 RS (PR)
ORDER OF DISMISSAL

1 unless it appears from the application that the applicant or person detained is not entitled
2 thereto.” 28 U.S.C. § 2243. Summary dismissal is appropriate only where the allegations in
3 the petition are vague or conclusory, palpably incredible, or patently frivolous or false. *See*
4 *Hendricks v. Vasquez*, 908 F.2d 490, 491 (9th Cir. 1990).

5 As grounds for federal habeas relief, petitioner puts forth in his petition four claims,
6 three of which are sufficiently detailed for the Court to determine whether it has jurisdiction
7 over the claims, while the fourth is given without any legal or factual basis. This fourth
8 claim, petitioner contends, is currently before the state courts. Petitioner moves to stay his
9 federal habeas action until that fourth claim has been exhausted in the state courts, and thus
10 will be presentable on federal habeas review. (*See* Docket No. 2.)

11 Petitioner’s motion is DENIED. As petitioner fails to state the legal or factual basis of
12 this fourth claim, the Court cannot determine whether it has jurisdiction over such a claim.
13 Consequently, a stay would not be appropriate at this time.

14 Accordingly, the petition is DISMISSED with leave to amend. Petitioner must file an
15 amended petition within 30 days from the date this order is filed. In this amended petition,
16 petitioner must provide sufficient legal and factual basis for all of his claims, including the
17 unexhausted one. Any claims that are insufficiently alleged will be dismissed. The first
18 amended petition must include the caption and civil case number used in this order (10-0759
19 RS (PR)) and the words FIRST AMENDED PETITION on the first page. Because an
20 amended petition completely replaces the previous petitions, petitioner must include in his
21 first amended petition all the claims he wishes to present. Petitioner may not incorporate
22 material from the prior petition by reference. Failure to file an amended petition in
23 accordance with this order will result in dismissal of this action without further notice to
24 petitioner.

25 At the time he files his amended petition, petitioner may file a renewed motion for a
26 stay. After a review of such a motion, a stay may be issued if circumstances warrant it.

1 It is petitioner's responsibility to prosecute this case. Petitioner must keep the Court
2 informed of any change of address by filing a separate paper with the clerk headed "Notice of
3 Change of Address." He must comply with the Court's orders in a timely fashion or ask for
4 an extension of time to do so. Failure to comply may result in the dismissal of this action.

5
6 **CONCLUSION**

7 Petitioner's motion for a stay (Docket No. 2) is DENIED as premature. The petition
8 is DISMISSED with leave to amend in accordance with the instructions in this order. Failure
9 to file an amended petition within 30 days from the date this order is filed will result in
10 dismissal of the action without prejudice.

11 This order terminates Docket No. 2.

12 **IT IS SO ORDERED.**

13 DATED: April 15, 2010

14 
15 RICHARD SEEBORG
16 United States District Judge
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1 **THIS IS TO CERTIFY THAT A HARD COPY OF THIS ORDER WAS MAILED TO:**

2 Thanh Van Do
3 H-88998
4 California State Prison - Solano
5 PO Box 4000
6 Vacaville, CA 95696-4000

7
8 DATED: 04/16/2010

9 s/ Chambers Staff
10 Chambers of Judge Richard Seeborg

11 * Counsel are responsible for distributing copies of this document to any co-counsel who
12 have not registered with the Court's electronic filing system.

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United States District Court
For the Northern District of California